

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

SOUTHERN BAKERIES, LLC

and

**BAKERY, CONFECTIONARY, TOBACCO
WORKERS, AND GRAIN MILLERS UNION**

15-CA-174022

Linda M. Mohns and Erin E. West, Esqs., for the General Counsel.

David L. Swider and Phillip R. Zimmerly, Esqs.

(Bose, McKinney & Evans, LLP, Indianapolis, Indiana) for the Respondent.

DECISION ON REMAND

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. I issued a decision in this matter on May 11, 2017. On May 1, 2018, the Board rendered its decision on many aspects of the case but severed the allegations pertaining to Respondent's work-rules, 366 NLRB No. 78. On December 7, 2018, the Board remanded the work-rule allegations to me for further consideration under its decision in *The Boeing Company*, 365 NLRB No. 154 (2017). The parties have declined to have the record reopened. They have stipulated to the legality of several rules alleged to be violative in the complaint. I accept the stipulation and hereby dismiss those complaint allegations.

With respect to the remaining rules they have filed briefs.

I dismiss the complaint allegations with regard to these rules:

Maintenance of allegedly violative rules (complaint paragraph 7)

The General Counsel alleged that Respondent is violating Section 8(a)(1) of the Act by maintaining the following rules in its employee handbook, Jt. Exh. 2. However, the parties have stipulated to the legality of the following three rules:

Employees, contractors, and visitors may not carry cameras or imaging devices into any Southern facilities.

This includes:

1. Conventional film, still cameras
2. Digital still cameras
3. Video cameras
4. PDA cameras
5. Cell phone cameras

An employee with authorization to take pictures in the facility must sign in at the front reception desk and be give a Photographer's Pass. This pass must be worn at all times while shooting pictures. A Southern management employee must accompany the employee.

Jt. Exh. 2, p. 13.

FACILITY RULES AND DISCIPLINARY PROCEDURES

GROUP A

These infractions are serious matters that often result in termination. These listed infractions are not all-inclusive. Any conduct, which could interfere with or damage the business or reputation of the Company or otherwise violate accepted standards of behavior, will result in appropriate discipline up to and including immediate discharge.¹

12. Unauthorized use of still or video cameras, tape recorders, or any other audio or voice recording devices on Company premises, in a Company supplied vehicle, or off-Company premises involving any current or former Company employees, without such person's expressed permission while on Company business.

¹ The parties stipulated that this rule was legal, but also addressed this rule in their briefs on remand. Assuming that the legality of this rule is dispute, I find that it does not violate Section 8(a)(1) for the same reasons I find Respondent's rule # 9 legal. Respondent's rule is materially indistinguishable from that found legal in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

Relevant Case Law Regarding Respondent's Rules

The legality of the contested rules in this case is governed by the Board's recent decision in *The Boeing Company*, 365 NLRB No. 154 (2017). In *Boeing*, the Board delineated 3 categories of "rules." Category 1 rules are those which are lawful because they either (1) do not prohibit or interfere with employee Section 7 rights when reasonably interpreted, or (2) the employer's justification for the rule outweighs the potential adverse impact on protected rights. Category 2 rules are those which warrant individualized scrutiny as to whether they prohibit or interfere with section 7 rights and whether legitimate justifications outweigh any adverse impact on these employee rights. Category 3 rules are those which are unlawful because the justification for their maintenance does not outweigh their adverse impact on employee Section 7 rights. A rule which is not unlawful to maintain, may be unlawful as applied. However, application of Respondent's rules is generally not an issue in this case.

The parties disagree as to the legality of the following rules:

3. Using Company time or resources for personal use unrelated to employment with the Company without proper authorization. This includes leaving Company property during paid breaks or leaving your assigned job or work area without permission.

I find nothing illegal in the requirement that employees are required to stay on company property during paid breaks. They apparently are subject to being called upon during these breaks to fill-in for other employees, Tr. 290. However, I find this rule is likely to be interpreted as restricting Section 7 rights given Respondent's failure to distinguish between employee rights during working time and break time, *Hyundai American Shipping Agency, Inc.*, 357 NLRB 860, 872-73 (2011), *enfd.* 805 F.3d 309 (D.C. Cir. 2015). A reasonable person would likely read the rule as prohibiting, for example, solicitation on behalf of a union during a paid break time in a break room. Per *Boeing*, I find that Respondent has not shown that it has a sufficient justification to prohibit protected activity during non-working time, even if that time is paid time. Thus, I conclude that the rule as written violates Section 8(a)(1).

9. Any off-duty conduct, which could impact, or call into question the employee's ability to perform his/her job.

The Board has not been entirely consistent with regard to this type of rule over the years. However, Respondent's rule does not appear to me to be materially different than one found legal in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). That rule read as follows:

Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community

The Board's decision makes it clear that the *Lafayette Park Hotel* rule would be a category 1 rule under *Boeing*. I find that Respondent's rule on off-duty conduct is also a category 1 rule and not illegal.

GROUP B

7. Bringing or allowing any non-employee inside the facility (including the break room) without prior permission from management. Unauthorized plant entry by employees

Jt. Exh. 2 pp. 17-19.

The General Counsel contends the last sentence of the rule violates Section 8(a)(1) because it does not prohibit plant entry (assumedly by off-duty employees) for any purpose. In this respect, the General Counsel relies on *Lytton Rancheria of California (d/b/a Casino San Pablo)*, 361 NLRB 1350 (2014); *St. John's Health Center*, 357 NLRB 2078, 2080-83 (2011). Respondent's the rule does not indicate when plant entry will be authorized (although one can assume that one instance would be when an employee is scheduled to work). The rule in *St. John's Health Center* made an exception for employer-sponsored events, such as baby showers and retirement parties.

The rule in *Lytton Rancheria* permitted off-duty access for business with the human resources department and orientation sessions. Pursuant to these decisions the General Counsel submits that under long-standing Board precedent in *Tri-County Medical Center*, 222 NLRB 1089 (1976), a valid rule must bar access to off-duty employees for all purposes and must not leave an employer with unbridled discretion as to when to allow off-duty employees into the plant and not to do so. I would distinguish Respondent's rule by the fact that it does not permit plant entry by off-duty employees under any circumstances. Although, one can argue that this allows Respondent unlimited discretion as to when to allow such access, I believe, as a policy matter, it would best to address Respondent's rule when it is applied in a discriminatory fashion. Since the rule, as written, does not permit off-duty employees access to the inside of the facility under any circumstances, I find that it does not violate Section 8(a)(1).

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act by:

Maintaining a rule that prohibits employees from using company time or resources for personal use unrelated to employment at any time, including nonwork time.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

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ORDER

The Respondent, Southern Bakeries, Hope, Arkansas, its officers, agents, successors, and assigns, shall

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1. Cease and desist from:

(a) Maintaining rules that prohibit employees from using company time or resources for personal use unrelated to employment at any time, including nonwork time.

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(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Rescind its rules that prohibit employees from using company time or resources for personal use unrelated to employment at any time, including nonwork time.

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(b) Within 14 days after service by the Region, post at its Hope, Arkansas facility copies of the attached notice marked "Appendix".³ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 16, 2015.

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² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

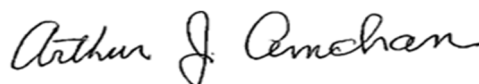
³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. February 11, 2019

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Handwritten signature of Arthur J. Amchan in cursive script.

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule that prohibits employees from using company time or resources for personal use unrelated to employment at any time, including nonwork time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SOUTHERN BAKERIES, LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-174022 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 321-9476.